The Central Law Journal.

SAINT LOUIS, JANUARY 25, 1878.

CURRENT TOPICS.

A BILL, introduced by Mr. Frye, of Maine, making all persons charged with crimes and offenses competent witnesses in their own behalf, in the courts of the United States, has been passed by the House of Representatives. It is in the following words: "In the trial of all indictments, informations, complaints and other proceedings against persons charged with commission of crimes, offenses and misdemeanors in the United States Courts, Territorial Courts, Courts Martial and Courts of Inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him."——The Queen's speech, delivered at the opening of the English Parliament, announces that the government intends to introduce during the session a bill "to simplify and express in one act the whole law and procedure relating to indictable offenses." This will be a considerable step towards the complete codification of the criminal law.——A bill is before the Ohio legislature giving a first lien upon the property of the corporation for supplies, materials and labor furnished to railroads.——The Canadian government will soon pass an *extra-mural* act, *i. e.*, a statute providing for the employment of persons, convicted of offenses against municipal laws and ordinances, upon the streets and roads of cities and towns.

A PRISONER indicted for a felony has no right to be personally present at the hearing of a motion for a new trial, and his absence will not invalidate a sentence subsequently passed upon him when he is present. This is held by the Supreme Judicial Court of Massachusetts, in *Com. v. Castello*, reported 16 Am. L. R. 735, with a learned note by Mr. Bennett. See Rex v. Gibson, 2 Stra. 968; s. c., Cunningham, 29; 2 Barnard, 412, 418. See, also, 1 Chit. Crim. Law, 659, 663; The Queen v. Caudwell, 17 Q. B. 503; State v. Rippon, 2 Bay, 99; Jewell v. Com. 22 Penn. St. 94, 101; Donnelly v. State, 2 Dutcher, 601; Com. v. Andrews, 97 Mass. 543; Anon., 31 Maine, 592. A prisoner indicted for a capital crime must be present, it is well settled, at the arraignment: Jacobs v. Com., 5 S. & R. 315; Hall v. The State, 40 Ala. 698. And when the judge charges the jury: Wade v. The State, 12 Ga. 25; State v. Blackwelder, 1 Phillips (N. C.), 38; Wilt v. The State, 5 Coldw. 11; The People v. Kohler, 5 Cal. 72; Jackson v. Com. 19 Gratt. 656. And when the verdict is returned: King v. Ladsingham, T. Raym. 393; Dunn v. Com. 6 Barr, 384; Rose v. The State, 20 Ohio, 31; Sargent v. The State, 11 Id. 472. And, also, when the sentence is pronounced: Rex v. Duke, Holt, 399; 1 Salk, 400; People v. Winchell, 7 Cow. 521; Jacobs v. Commonwealth. But less strictness is required in cases not capital: Holmes v. Com., 25 Penn. St. 221; State v. Craton, 6 Ired. 164; Stephens v. The People, 19 N. Y. 549; Grimm v. The People, 14 Mich. 300; State v. Steeffle, 13 Ia. 603. The rendition of a verdict in the absence of a prisoner works only a mis-trial, and the verdict should be set aside and the defendant tried again: People v. Perkins, 1 Wend. 91; State v. Hughes, 2 Alabama, 102; Younger v. State, 2 W. Va. 579. And if present when the verdict is returned, but absent when sentence is pronounced, he is not entitled to a new trial, but only to a new *sentence*. If the former judgment is reversed on error for the prisoner's absence, he is simply remanded for sentence according to law: Cole v. The State, 5 Eng. 318; Kelly v. The State, 3 Sm. & Mar. 518. Neither the prisoner nor his counsel can waive, it is said, this right to be present: Nomaque v. People, Breese, 109; Prine v. Com., 6 Harris, 103. But in misdemeanors less strictness is required, and the trial may, by leave of court, often proceed and the verdict be rendered, and sentence of a fine be pronounced, in the defendant's absence. See United States v. Mayo, 1 Curtis C. C. 433; Sou v. The People, 12 Wend. 344; Canada v. Com., 9 Dana, 304; Warren v. The State, 19 Ark. 214; Holliday v. The People, 4 Gil. 111.

THE Judges of the Superior Courts of Philadelphia have presented a memorial to the governor, asking to be relieved from the duty now imposed upon them by law, of making appointments to various city offices. There can be no doubt of the great impropriety of the legislature imposing such duties upon the judi-

ciary. The executive and judicial branches of the government should be kept separate at any price; and if the legislature does not sufficiently comprehend the danger of such legislation, the courts may save themselves from the performance of extra-judicial duties by declaring such statutes unconstitutional. This has been done heretofore in several cases. In 1792 Congress passed an act authorizing and directing the Circuit Courts of the United States to receive and examine the applications of soldiers of the Revolution to be placed on the pension list, and certify them to the Secretary of War, but several judges refused to act. The Circuit Judges of New York, consisting of Jay, Chief Justice, and Cushing, Justice, held that the act was unconstitutional. "By the Constitution of the United States," it was said, "the government thereof is divided into three distinct and independent branches, and it is the duty of each to abstain from, and to oppose encroachments on either. Neither the legislature nor the executive branches can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner." Hayburn's case, 2 Dallas, 409. The Supreme Court of New York also held that the act was unconstitutional, because it imposed duties upon the court which were not of a judicial character, or to be performed in a judicial manner. And it was further held, that, because the act imposed the duties upon the court, the judges could not act as commissioners, and their acts as such were unauthorized and void. See Chief Justice Taney's note to U. S. v. Ferveria, 13 Howard, 52. A similar question came before the Supreme Court of the United States in 1851. By a special act of Congress, the judge of the District Court of the Northern District of Florida was authorized to receive and adjudicate the claim of a Spanish citizen against the United States, arising under the treaty of 1819. Hayburn's case was referred to, and the opinions expressed by the judges of the circuit court approved. Chief Justice Taney, in delivering the opinion of the court, referring to the acts of Congress, said: "The powers conferred by these acts of Congress upon the judge, as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. * * But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States." United States v. Ferveria, 13 How. 40. See opinion of White, J., 22 Pitts. L. J., 129, refusing to appoint assessors, as required by a state act. The Supreme Court of Massachusetts, in the Case of the Supervisors of Election, 114 Mass., 247, declared that an act requiring them to appoint overseers, was unconstitutional, as that was not a judicial duty, and, in Minnesota, the supreme court of that state held that an act, empowering either house of the legislature to obtain the opinion of the supreme court, was unconstitutional. In Connecticut the same course has been followed. See Reply of the Judges, 33 Con. 586; *contra*, People v. Provines, 34 Cal. 520; People v. Bush, 40 id. 344.

Several interesting cases upon covenants affecting land have been recently decided in the English courts. In *German v. Chapman*, 26 W. R. 158, a deed contained a covenant not to use any building erected on the land "otherwise than as and for a private residence only, and not for any purpose of trade." The court of appeal granted an injunction restraining the erection of a building to be used as a school or home for orphan daughters of missionaries, holding that the words "not for any purpose of trade," were words of addition, and not of limitation. Several previous decisons were cited. Kemp v. Sober, 1 Sim. N. S. 517, where the covenant was not to carry on any trade, business, or calling whatever, and it was held that using the house for a girls' school was a breach. In Doe v. Keeling, 1 M. & S. 95, the words were "any trade or business whatsoever," and a boys' school was decided to be within them. To use a house as a private lunatic asylum was not considered to be a breach of the covenant in Doe v. Bird, 2 A. & E. 161, because there the words "trade or business" were explained by an enumeration of particular trades, and by the general words "or any offensive trade," showing that only trades conducted by buying and selling were meant. In Wickenden v. Webster, 4 W. R. 562, 6 E. & B. 387, the lessee was not to carry on any public trade or business whatsoever, and the house was to be used as a private dwelling-house only. There it was held that using the house as a school

could not be said to be using it as a private dwelling-house only. In Johnstone v. Hall, 4 W. R. 417, 2 K. & J., 414, the lessee had covenanted not to use buildings erected on the lands demised for any of certain specified trades, "or any other trade, business, or employment whatsoever," but only as private dwelling-houses. One of the houses on the premises had been used for a girls' school, and Wood, V. C., recognized the authority of Kemp. v. Sober, and only refused relief because plaintiffs claimed as reversioners. In *Richards v. Revett*, 26 W. R. 166, a lease contained a covenant not to allow any house built on the land adjoining that demised to be used for the sale of liquor, and it was held (following Wilson v. Hart, 14 W. R. 748, L. R. 1 Ch. App. 463), that an assign with notice was in the same position as a party to the covenant, and that the court would not require substantial damages to be shown before granting an injunction to restrain a breach. In *Luker v. Dennis*, 16 W. R. 167, on a lease of a public house, the lessee covenanted with the plaintiff to purchase all the beer which should be consumed upon the premises, from the plaintiff. The court ruled that an assignee, as an assign with notice, was bound in equity by the covenant in the lease, but that such covenant was conditional on the fulfillment of an implied covenant to supply good beer, and that evidence to show a breach of this implied covenant, on the plaintiffs' part, was admissible. *Lord Cowley v. Byas*, 16 W. R. 1, arose under a statute which provided that no ground, not already used as a cemetery, should be used for burials, within the distance of 100 yards from any dwelling-house, without the consent of the occupier. On an application for an injunction, restraining the defendant from using a piece of land, from the boundary of which the plaintiff's house was less than 100 yards distant, as a cemetery, the court of appeal held, that the act did not prevent the conversion of such land into a cemetery, provided that no actual interments were made within 100 yards of the dwelling-house.

THE NATURE OF THE ESTATE IN DOWER.

"The nature of the interest which, inchoate in the wife, becomes consummate in the widow in the way of dower, deserves a distinct notice, since, in many respects, it is unlike any other known to the law." Washburn on Real Property, Vol. I, Chap. VII, § 6, page 301.

"It is no right which her husband can bar or incumber; nor she herself, except by deed in which her husband joins, and then it is only in the way of estoppel, for her deed, even of grant, does not pass any title to the estate. She has not, in this stage of her right, even a *chose in action*, in respect to the estate; nor can she protect it in any way from waste or deterioration by her husband or his alienee; nor is her right, in any sense, an interest in real estate, nor property of which value can be predicated. She can not convey it, nor is it a thing to be assigned by her during the life of her husband." Ibid, Vol. 1, p. 301.

The author from which the above citation is made refers to many decisions fully sustaining the text. Yet, without verbal criticism on the terms "*inchoate*," and "consummate," used by the author in the paragraph from which we have quoted, and without impugning the weight of authority justly belonging to this distinguished writer, we yet will demonstrate that the policy of the law, and, in many instances, the practice of our courts, do not sustain the author in his position. As far as Washburn extends his observations as to the inchoate interest of the wife in the real estate of her husband which may become consummate by her becoming a widow, he is right, but he does not present the full legal view appertaining to this subject.

In some respects the law looks upon the interest of the wife in her husband's estate as an existing right. In nearly every state in the American union the law prescribes the method by which the wife shall divest herself of dower, which, if not done, a purchaser fails to obtain that title which is considered full and complete, and which the wife alone can complete by her relinquishment, and which remains to be consummated by no act of hers, but by the law, if she becomes a widow. The inchoate right of dower has, however, been considered during coverture as worthy the intervention of courts of equity, and protected as an existing contingent right.

The following authority, with an able opinion from the learned court, is worthy of the most careful consideration, and if not in conflict with many decisions, certainly carries the law to a more reasonable extent. In the Su-

preme Court of the State of Iowa, where the statute, instead of giving the widow a life estate in dower, gives the fee simple to one-third of the husband's estate, it was decided by a full court that "the wife may maintain an action to preserve her right of dower while her husband is living; as where by fraud the husband is allowing his real estate to be sold under execution, in order to defeat the dower of his wife, she may have the sale set aside so far as to protect her dower." Buzick v. Buzick *et al.*, 42 Iowa, 3 Cent. L. J. 786.

The court in this case remarked, Day, J., delivering the opinion: "It would be a standing reproach to a court of equity if it were powerless to grant relief under the circumstances disclosed in this case. It is claimed by appellants that the dower interest of the wife is inchoate and contingent; that she may die before the husband, and then her estate would never vest, and that, during the life-time of her husband, she can not be heard to complain, whatever disposition may by made of the property subject to dower. If this be so, the wife holds the dower entirely at the mercy of her husband, and he may by confessing false judgments, and, conniving with the purchaser at the sheriff's sale, always defeat her dower. A right which a court can not protect, ceases to possess the essential qualities of a right. Although the wife's dower, during the life-time of her husband, is inchoate and uncertain, yet it possesses the elements of property. The relinquishment of dower constitutes a valuable consideration, sufficient to support a conveyance of property to the wife. Bullard v. Briggs, 7 Pick 533. Its probable present value may be computed by the annuity tables, 2 Scribner on Dower, page 6, note 5. In Bullard v. Briggs, *supra*, Parker, C. J., announcing the opinion of the court, used this language respecting the dower interest: 'Though she had no actual estate in the dower during the life of her husband, yet she had an interest and a right, of which she could not be divested, but by her consent or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain; it was an interest which the law recognizes as the subject of conveyance by fine in England, and by deed with us. It is more or less valuable according to the relative ages, constitutions, and habits of the husband and wife. It is more than a possibility, and may well be denominated a contingent interest.' The case of Petty v. Petty, 4 B. Monroe, 215, is fully considered and well reasoned, and is a direct authority in support of the right of this plaintiff to maintain an action for the protection of her dower. This was an action by the wife to set aside a conveyance made by her husband, a few days before his marriage, of all his real estate, to his children of a former marriage. The plaintiff alleged that the conveyance was in fraud of her right of dower. In the course of the opinion the court say: 'But the question arises whether she has such an interest, in the life-time of her husband, as to maintain her bill. She may not survive her husband, and, consequently, may never be entitled to a perfect right to dower. * * * Yet she might survive her husband, and in that event would be entitled to a vested interest, but for the deed. Though she has not a vested interest, yet she has, or would have had, immediately on the marriage, but for the deed, a potential contingent right, of which she could not be deprived, and that right is valuable to her as affording to her security for future maintainance, in the event of her surviving her husband, though it can not be enjoyed while he lives. Though a contingent, it is a valuable interest, and may be sold, conveyed or released for a valuable consideration, and the law treating it as valuable, and as an existing incumbrance on land, has provided a solemn mode for its release, guarding the wife from imposition or influence from the husband, in the act of surrender. It has been deemed, in chancery, a sufficient existing incumbrance, if not surrendered, to authorize the recission of an existing contract for land. May not a court of chancery, therefore, treat it as such a valuable interest, though contingent, as to free it from the embarrassment which the fraudulent acts of the husband have thrown around it, prior to, and in anticipation of marriage? We think it can.'" This is the opinion of the court in the case of Petty v. Petty, cited and approved in the case of Buzick v. Buzick. "It is admitted that dower is a mere legal right, and that a court of equity, in assuming a concurrent jurisdiction with the courts of law upon the subject, professedly acts upon the legal estate; for dower does

not attach upon an equitable estate." Story Eq. Jur., Vol. 1, § 630.

If Washburn is right in the position he maintains in relation to the subject of dower, it is only because he has confined himself to a limited discussion of the question as a purely legal estate, which it is in its origin and status in the courts; yet there is a concurrent equitable jurisdiction, and Story says "it is highly favored in equity."

It appears that, while Washburn fully recognizes the rights of dower after the wife becomes a widow, he does not appreciate or omits to notice the power and functions of the courts of equity over what he considers an inchoate right. It is evident, from the learning of our American courts, that the law leans very much to the recognition, in a practical sense, of what Washburn considers as during coverture, not "even *a chose in action* in respect to the estate" that is of the husband. On this point issue may be successfully taken with the learned and able author of the work on real property.

Washburn says, speaking of the powers of the wife, in relation to her dower rights: "She can not convey it." The practice under the statutes of nearly every state in the Union shows to the contrary, and recognizes prescribed forms in which the wife can, and is required to pursue in order to convey her right to dower, not her future or contingent, but her present existing right, to property that may or may not vest in future. It is on this point, we think, it could be shown from satisfactory authority, and the common practice of state courts, that Mr. Washburn has not fully represented the power of the court. There are circumstances in which the courts have been required to exercise authority over the inchoate right of the wife to her dower, and to treat it as an existing right, leaving it to time to develop whether it will ever become vested or not.

The learning involved in the discussion of this topic is, to a certain extent, decidedly opposed to the doctrine set forth by Washburn. The logic of the law and common sense and justice is with the opinion of the Supreme Court of Iowa, in the case of Buzick v. Buzick, and the authorities on which it rests.

W. A. C.

HOYT POST, Esq., has tendered his resignation as reporter to the Supreme Court of Michigan, to take effect March 31, 1878, and Henry A. Chaney, Esq., one of our contributing editors, has been appointed to succeed him.

PROMISSORY NOTES.

GIVENS v. MERCHANTS NATIONAL BANK.

Supreme Court of Illinois, June Term, 1877.

[Filed October 9th, 1877.]

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

1. PLEA IN ABATEMENT — NON-RESIDENCE OF PARTIES.—In suit on a promissory note by endorsee against endorser, it is not a good plea in abatement that, when the cause of action accrued, and when suit was brought, both plaintiff and defendant were non-residents of the state in which suit was brought.

2. ENDORSEMENT—JOINT LIABILITY.—The fact that a note is endorsed "St. Louis Marble Co., by James Givens, pres't., James Givens, I. V. W. Dutcher," raises no presumption that it is a joint undertaking of the two latter.

3. PRESENTMENT AND NOTICE—WAIVER.—Knowledge of the fact that a note is past maturity, and no presentment has been made or notice given to endorsers, is necessary in order to make good a waiver of such fact by a promise of an endorser to pay the note. But proof of direct knowledge is not essential; it may be inferred from circumstances.

SCHOLFIELD, C. J., delivered the opinion of the court:

Appellee recovered a judgment against appellant in the court below as endorser of a promissory note, made by one Charles L. Rice to the St. Louis Marble Company.

The note was executed and endorsed in St. Louis, Missouri, where appellant resides. The suit was commenced by attachment, and the first objection urged is, the court below erred in sustaining a demurrer to appellant's plea in abatement. The plea alleged that both appellant and appellee were, when the cause of action occurred, and when the suit was brought, non-residents of the state of Illinois, and residents of the state of Missouri. The objection is not well taken. It is expressly overruled in Mitchell v. Shook, 72 Ill. 492; see, also, Mason v. Burton, 54 Id. 353; Schulter v. Piatt, 12 Id. 418.

Another objection urged is, that there is a variance between the allegations and proofs in this: The note offered in evidence is endorsed thus:

"ST. LOUIS MARBLE CO.,
By James Givens, Pres't.
JAMES GIVENS,
I. V. W. DUTCHER."

Dutcher is not noticed in the declaration. It is insisted he is jointly liable as endorser with appellants. This, in our opinion, is a misapprehension. The only evidence from which such an inference is pretended to be drawn, is the simple endorsement of the names on the note in blank in the order we have given; and this, very clearly, instead of raising the presumption of a joint undertaking authorizes the presumption that the undertaking was not joint, but that of successive endorsers; and in that view the suit was well brought against

appellant alone, without noticing the subsequent endorser. 2 Parsons on Bills and Notes, 19.

The principal contest is, however, whether the case is made out in respect of presentment and notice, the note having been executed and endorsed, and it being stipulated that, by the law of that state, proof of presentment and notice is required to fix the liability of the endorser. We understand the law in that state to be as it is recognized in many of the other states and laid down in text-books, that the consequences of a neglect to give notice of non-payment of a bill or note may be *waived* by the person entitled to take advantage of them, and that such waiver may be presumed from a promise made after maturity to pay the note with full knowledge of the facts, or under circumstances from which it is to be inferred the party ought to have had full knowledge of the facts. Chitty on Bills (8th Am. Ed.), 523–534; 1 Parsons on Notes and Bills, 595; Story on Prom. Notes, § 276; Dorsey v. Watson, 14 Mo. 62; Mentz v. Osborn, 5 Id. 546.

It is proved that appellant, on several occasions, after the maturity of the note, promised to pay it; but, he says, he was not aware at the time he made these promises that he had any legal defense to the note. This may be true, and have resulted simply from his ignorance of the law, or it may have been true because he was ignorant of the facts. If it was because of his ignorance of the law, it can not avail him, and he must be charged with full knowledge. Chitty on Bills (8th Am. Ed.), 735*a*; Story on Prom. Notes, § 362; Parsons on Notes and Bills, 607–608; Tibbetts v. Dowd, 23 Wend. 378.

It is said in Parsons on Notes and Bills, p. 602: "It has been sometimes said that a waiver can not be inferred, But, if this is meant that direct knowledge must be proved, we think it incorrect. Indeed, there does not appear to be any good reason why knowledge may not be proved in the same manner, and by the same evidence in this matter as in any other. A jury will be justified in inferring knowledge from a variety of circumstances, such as the situation aud connection of the parties, the words and acts of the endorser, the time which has elapsed between the maturity of the note or bill and the promise, and the like." See, also, Story on Prom. Notes, § 359. This seems to have been recognized by the court in Mentz v. Osborn, *supra*.

Here, in addition to the deliberate and unqualified promise of appellant to pay the note, made after its maturity, there was this additional evidence:

The note matured Nov. 1st, 1873, and on the 22d of December, 1873, the following letter was written by appellant and sent to the president of appellee:

"ST. LOUIS, Dec. 22d, 1873.

Louis B. Parsons, Esq., Pres't.:

DEAR SIR:—In case you prosecute Charles L. Rice, on his note for $10,000, we agree to reimburse you all attorney's fees and other expenses attending such prosecution; this agreement not to interfere or prevent your bank from bringing suit against us, or either of us, should you desire to do so. Very respectfully,

ST. LOUIS MARBLE CO.
By James Givens, Vice-Pres't.
JAMES GIVENS.
I. V. W. DUTCHER."

Pursuant to this request suit was instituted against the maker of the note, on the 24th day of December, 1873, in the Superior Court of Cook County, Illinois, in which county the maker resided, and judgment therein was rendered in favor of the plaintiff, for the amount due on the note, on the first Monday of March, 1874. And, thereupon, on the 10th day of April, 1874, appellant executed and caused to be delivered to appellee's president, the following agreement in writing: "Should it be necessary to institute proceedings to put C. L. Rice into bankruptcy, I hereby agree and bind myself to pay any and all expenses of any kind incurred by reason of such proceedings.

ST. LOUIS MARBLE CO.
By James Givens, Vice-Pres't.
April 10th, 1874. JAMES GIVENS."

In conformity with this, appellee instituted, on on the 20th day of April, 1874, in the United States Court for the Northern District of Illinois, proper proceedings to put the maker of the note into bankruptcy, which resulted, in due time, in a decree to that effect. Execution was issued on the judgment and returned "No property found;" and nothing was realized from the proceedings in bankruptcy. Other evidence clearly shows the insolvency of the maker of the note, at the time of its maturity.

We think the evidence is abundantly sufficient to show that appellant had full notice of all the facts affecting his rights when he made the promise of payment. He knew the note was due and was unpaid. He knew what notice had been given himself of its presentment and non-payment, and he evidently also knew that the solvency of the maker was at least very doubtful.

We think the judgment is substantially right and that it should be affirmed.

MARRIAGE PROCURED BY FRAUD.

TOMPPERT'S EXR'S v. TOMPPERT.

Court of Appeals of Kentucky, September Term, 1877.

Hon. WM. LINDSAY, Chief Justice.
" W. S. PRYOR, } Associate Justices.
" M. H. COFER, }
" J. M. ELLIOTT, }

1. A MARRIAGE PROCURED BY FRAUD IS VOIDABLE only at the election of the party defrauded.

2. THE PARTY WHO COMMITS THE FRAUD IS BOUND, and remains bound, until the party deceived has made his or her election, and will thereafter be bound or not, according to the election made. Whether an election, after discovering the fraud, would have absolved the parties from the obligations of the marriage, without the judgment of a court annulling the marriage, *is not decided in this case.*

3. THE RIGHT TO AVOID A MARRIAGE is personal, and if not taken advantage of by a party in his lifetime, it can not be exercised after his death by his executors or devisees.

4. A WIDOW HAVING NO CHILDREN BY HER LAST HUSBAND is entitled to one-third only of his personal estate, if he left children by a former marriage. Subsec. 4, sec. 11, ch. 31, General Statutes.

APPEAL from Louisville Chancery Court:

I. & J. Caldwell and *Winston*, for appellants.

"Marriage is considered by the law in no other light than as *a civil contract*." Tyler on Infancy and Coverture, sec, 618; see, also, Reeve's Domestic Relations, p. 195. The marriage of a man and a woman can not sanctify the fraud of the latter, as in this case, in procuring or inducing the marriage. "A marriage procured by force or fraud is also void *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question; the basis of the marriage is *consent*, and the ingredient *fraud* or duress *is as fatal in this as in any other contract*, for the free assent of the mind is wanting." 2 Kent's Com., p. 42; see, also, Reeve on Dom. Rel. p. 206; Schouler's Domestic Relations, pp. 25, 35; Tyler on In. and Cov. p. 863; Mather v. Ney, 1 Maule & Selwyn, 265; Frankland v. Nicholson (otherwise Franklin), 3 Maule & Selwyn, 260. The provision of the General Statutes (sec. 5, art 1, ch. 52), that courts of equity jurisdiction may declare void a marriage procured by force or fraud, is in perfect accord with the authorities cited above.

M. Mundy, for appellee.

COFER, J., delivered the opinion of the court:

The appellee, under the name of Mary Albright, was married to Phillip Tomppert, Sr., April 2, 1872. Tomppert died October 29, 1873, leaving no issue of the marriage, having first made and published his last will and testament, devising all his estate to four children of a former marriage. This suit was brought by the appellee for the allotment of dower and distribution of the personal estate.

The executor and devisees answered, and alleged that she married the testator under the name of Mary Albright, claiming to be the widow of ——— Albright, when her name was not Albright, and she was not the widow of Albright, and had never been married to him, and that her marriage with Tomppert was procured by fraud and was void, and on that and the additional ground that she, without fault on his part, abandoned the bed and board of the testator for several months before his death, resisted her claim to dower and distribution. The chancellor adjudged in her favor, and the executor and devisees prosecute this appeal. We assume, for the purposes of the case, that the facts alleged have been established by the evidence.

Appellant's counsel cite several authorities which seem to sustain the broad proposition, that a marriage procured by fraud is void *ab initio*, and may be treated whenever called into question. Schouler's Domestic Relations, 35: Reeve's Domestic Relations, p. 206; 2 Kent, 767; 3 Maule & Selwyn, 260 and 537. Chancellor Kent says: "A marriage procured by force or fraud is also void *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question." Mr Schouler says: "All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract." Mr. Reeve says, speaking of marriages procured by fraud: "The true point of light in which this ought to be viewed, I apprehend, is, that the marriage was void *ab initio*." And Mr. Bishop, in his work on Marriage and Divorce (sec. 115) recognizes the same doctrine.

This is no mean array of authorities, yet we feel compelled, at whatever risk, to dissent from their views.

Mr. Bishop (section 46), speaking of void and voidable marriages, says: "A marriage is said to be void when it is good for no legal purpose, and its validity may be relied upon in any proceeding, in any court, between any parties, either in the lifetime or after the death of the supposed husband and wife, whether the question arises directly or collaterally." And in section 122 the same author says: "There are various principles applicable alike to fraud, error and duress. We may presume that the guilty party would not be permitted so far to take advantage of his own wrong as to maintain a suit for nullity solely on that ground. The party imposed upon may, if he choose, waive the tort, and thereby render the marriage good. Thus, a voluntary cohabitation after knowledge of the fraud or error, or after the cause of fear is removed, will cure the defect," etc. And, again, in section 123, the same author says of marriages procured by fraud, error or duress: "They are good at the election of the party injured, who, on being disenthralled from the influence of the fraud, error or duress, may then give a voluntary consent, and the other party can not set up his wrong to object that the consent was not mutual."

Mr. Tyler, in his work on Infancy and Coverture, uses this language on this point: "There is a great difference between a void and a voidable marriage, which it is important to notice. A void marriage is at all times a nullity, and binds no one, and is not valid for any legal purpose whatever; it leaves the parties to it in just the same situation, to all intents and purposes, as though there had been no pretended marriage at all. In such cases, if the parties cohabit, they are adulterers and fornicators, and their offspring, if any, are bastards. But a voidable marriage is valid for all civil purposes, and binding upon the parties so long as it is acted upon and recognized by them, and until its nullity is declared by a competent tribunal; and if the marriage has not been dissolved by sentence or decree during the joint lives of the parties, it will be too late to apply for its avoidance, and, consequently, the survivor will be entitled to curtesy, dower, and the other rights of a surviving husband or wife." The same distinction is stated in much the same language by Mr. Schouler (p. 24) and was recognized by this court in Bassett v. Bassett 9 Bush, 696.

No other contract recognized by law is held to be void by fraud. It is true that text-writers and judges sometimes use the term void in speaking of such contracts, but it is an inaccurate use of lan-

guage. Thornton v. McGrath, 1 Duv. 349. Such contracts are voidable only at the election of the party defrauded. The party who commits the fraud is bound, and remains bound, until the party deceived has made his or her election and will thereafter be bound or not according to the election made.

If Tomppert was procured by fraud to marry the appellee, she was bound by the marriage, and remained bound until he elected to avoid it for the fraud. Whether, if he had so elected on discovering the fraud, she and he would have been alike absolved from the obligations of the marriage without the judgment annulling it, need not be decided. It was not alleged that he did so elect, and for that reason, if for no other, the facts stated in the answer do not show a right in the appellants to treat the marriage as void.

The petition and answer show that the marriage was solemnized according to the forms of law. This devolved, on those wishing to treat the marriage as void, the burden of showing, not only that there was fraud, but also that Tomppert had availed himself of his privilege to treat the marriage as void. Bassett v. Bassett, *supra*. For aught that appears in the answer, he may not have elected to treat it a void, but may have waived the wrong, and there by rendered the marriage valid and binding upon both, as if no fraud had been committed. It may be that he never discovered the fraud. But this can make no difference. The right to take advantage of it was personal, and not having, as far as appears, been exercised by him, can not be exercised after his death by his executor or devisees.

If a marriage procured by fraud is void, the most unjust and absurd consequences would follow. A void marriage is incapable of ratification. It is as if no pretended marriage existed—neither party is bound; the guilty and the innocent are alike at liberty to disregard it. If such a marriage as this is void, the guilty party may set up his or her fraud in order to escape the responsibilities incident to the marriage relation. Not only so, but although the injured party may elect to waive the wrong, and the guilty party may not desire to insist upon it, third parties may do so. That which leads to such consequences can not be law. The peace and good order of society, the happiness, the repose and the honor of families, as well as the principles of natural justice, forbid the recognition of such a rule.

There may be adjudged cases which seem to favor it, but if there are, it will no doubt be found, upon examination, that the marriage was either declared void by statute, or was between parties, one of whom was legally incompetent to contract marriage, or that the case was one not calling for observance of the distinction between a void and voidable marriage. This court, in the case already cited, quoted, with apparent approval, from Kent, Schouler, and Bishop, that a marriage procured by duress is void. But that was a direct proceeding by the injured party to annul the marriage, and it was wholly immaterial whether it was void or merely voidable, and, the attention of the court not having been directed to the distinction, no notice was taken of it. But the subsequent part of the opinion shows that the court did not regard the marriage as void.

But the court erred in adjudging to the appellee one-half the surplus personalty. He left children by a former marriage, and she was only entitled to one-third of such surplus. Sub-section 4, sec. 11, chap. 31, Gen. Stat.

For this error alone the judgment is reversed, and the cause remanded for judgment in conformity to this opinion.

UNIFORMITY IN TAXATION.

SCHETTLER v. THE CITY OF FORT HOWARD *ET AL.*

Supreme Court of Wisconsin, August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

1. ASSESSMENT.—To support a tax, there must be a valid assessment, made in substantial compliance with the statute. Hersey v. Supervisors, 37 Wis. 75, and Marsh v. Supervisors, 5 Cent. L. J. 509.

2. INJUNCTION.—A uniform and intentional assessment of property in a city, on a basis of *one-third* of its real value, instead of "at the full value which could ordinarily be obtained therefor at private sale, and which the assessor believed the owner, if he desired to sell, would accept in full payment," (R.S., ch. 18, sec. 31,) is invalid; and the collection of a tax based on such assessment, by sale of lands, will be enjoined.

APPEAL from the Circuit Court of Brown county.

Action to enjoin the collection of taxes assessed in 1874 upon the land of the plaintiff, within the limits of the defendant city.

The court found, among other things, as conclusions of fact, that the assessor of said city for the year 1874, who made the assessment upon which the tax mentioned in the complaint is based, did not, in very many instances, make his assessment of the personal property of said city upon actual view thereof, or upon his own opinion of the value of said property; but the valuation of personal property, as placed by him in the assessment roll of said city for said year, as assessed against the different tax-payers of said city, was obtained, for the most part, from each individual tax-payer, and was, in most cases, the value placed upon each tax payer's personal property by himself. That said assessor, when he began to make his assessment of property in said city, left with each tax-payer a printed blank, and requested each one to fill it out, inserting in the proper blanks the kinds of personal property owned by him, and its value. That he afterwards collected these blanks as filled out by such tax-payers, requiring them to verify the same by affidavit, and inserted the amount therein stated as the amount properly assessable to such tax-payers on personal property. That he adhered to the valuation as fixed by the tax-payer in some cases where he knew, or was strongly of opinion, that the valuation was too low, and in other cases made no effort to examine or form an

opinion or judgment of his own as to the value of personal property. That, by reason of certain specified instances of under-valuation, a large amount of personal property escaped taxation, and that thereby the amount of taxes required and actually levied upon the real estate of the plaintiff was greatly increased.

As conclusions of law the court found: 1. That the taxes so assessed, levied and attempted to be collected, are a lien upon plaintiff's said real estate, and a cloud upon his title. 2. That they are illegal, inequitable and void. 3. That the plaintiff is entitled to the relief demanded in the complaint.

W. J. Lander, for defendant and appellant; *John J. Tracy*, for plaintiff and respondent.

COLE, J., delivered the opinion of the court:

Little need be said in this case, in view of the decision in Hersey *et al.* v. Supervisors of Barron County, 37 Wis. 75, and Marsh *et al.* v. Supervisors of Clark County. 5 Cent. L. J. 509. In those cases it was held that, in order to support a valid tax, there must be a valid assessment made in substantial compliance with the statute. That a proper listing and valuation of property by the assessor, constitute the very foundation of the subsequent proceedings; and where the assessor makes an assessment in direct violation of the rules and principles prescribed by statute, the tax fails. It is quite unnecessary to restate the argument in support of these results. It only remains to apply the doctrine of those cases to the one before us.

This case involves the validity of a tax on real estate in Fort Howard, for the year 1874. The plaintiff challenges the validity of the tax on various grounds, only one of which will be noticed. On the trial, James Delaney was sworn on the part of the plaintiff, and testified substantially as follows: "I was assessor in Fort Howard in 1874, and made the assessment there that year. I made the assessment upon the basis of about one-third the real value of the property." Again, in another part of the testimony, when speaking of the basis upon which he assessed the property of certain manufactories, he says: "I can answer positively, that I did not assess those manufactories low to encourage manufacturing in the city. I had no such intention, and assessed it at what I thought was one-third its full value, and what I think was an equal valuation of all other property in the city, as near as my judgment would allow. I assessed it at what I thought was one-third its true value." Indeed, the fact is undisputed that the rule or basis upon which all the real and personal property of Fort Howard was assessed for that year, was one-third its actual value. It is very plain that such an assessment was wholly unauthorized and in direct violation of the statute upon the subject. The statute declares that "real property shall be valued by the assessor from actual view, at the *full value* which could ordinarily be obtained therefor at private sale, and which the assessor shall believe the owner, if he desired to sell, would accept in full payment." Sec. 31, Ch. 18, Gen. Stats. As elements of value, the assessor is required to consider certain things in making the assessment of real estate. Without referring in detail to the provision, in respect to the assessment of personal property, it is sufficient to say that, as far as practicable, it is required to be assessed upon actual view, at its full value. And the oath annexed to the assessment roll requires the assessor to swear, among other things, that each valuation of property made by him is the *full value* which could ordinarily be obtained for the same at private sale, and which the assessor believes the owner, if he desired to sell, would accept in full payment therof. Sec. 56. It appears that all the plain provisions of the statute were entirely disregarded by the assessor, who assumed to make the assessment according to an arbitrary standard adopted by himself. Within the decisions above referred to, the assessment was illegal and the tax void.

It was, however, agreed by the counsel for the city, that as all the property was valued on the same basis, the illegality in making the assessment could work no injury to the plaintiff. But if it be true, as this court has held, that a valid tax must be founded on a valid assessment, the argument proves nothing. There is really no security to the tax-payer, except in requiring assessors to perform their duty and make assessments in substantial compliance with the law. For, if the assessor in one town is permitted to assess property at one-third its value, the assessor in another town may assess it at one-half or one-fourth, while still another at double its value, substituting the mere caprice of the officer for the rule of the statute, and resulting in the grossest inequalities and injustice in the taxes imposed. Therefore, without considering any other question in the case, we affirm the judgment, on the ground that the assessment as made was illegal and void.

RYAN, C. J., concurring:

Some surprise and apprehension were expressed at the bar, upon the argument, at an intimation from the bench of the ground of judgment in this case, following Hersey v. Supervisors, 37 Wis. 75, and Marsh v. Supervisors, 5 Cent. L. J. 509.

It was intimated, as it has been on other occasions, that the statutory rule of assessment is frequently or generally disregarded by assessors; and that the consequence of holding assessors to a compliance with their duties, under the statute and the constitution, would be disastrous. It is impossible for me to judge how far so vicious a habit may prevail among assessors. But even if it were universal, it seems impossible to me that it should influence the court to hesitate in giving effect to all the consequences of their willful disregard of duty. If it be true that assessments throughout the state are frequently or generally, or universally made in defiance of the statutory rule, it appears to me better that the state, and the municipal corporations of the state, should suffer inconvenience, than that our whole system of taxation should, at the mere will of local officers, be a fraud upon the constitution, and statutes carefully framed in compliance with the constitution.

The question, I think, resolves itself into this:

Whether statutory officers can, in the execution of their office, wilfully disregard the safeguard of the statute which creates their office; whether it is for the legislature to provide a general and constitutional rule of assessment, or for assessors to set the statute at defiance, and to establish, each for himself, several and unconstitutional rules.

The statute is so carefully framed that it does not lightly trust the conscience of assessors. It requires from each a precise and positive affidavit that he has made his assessment upon the statutory rule. If an assessor do not annex his affidavit to his assessment roll, he does not complete his duty, and there is in law, no assessment. If the assessor make and annex the affidavit to an assessment made in violation of the statutory rule, he takes an absolutely false oath in the execution of his office. What faith can be reposed in an assessment so made and verified? *Falsus in uno, falsus in omnibus.* What security is there that such an assessment is just, equal or honest, in other respects, even upon the rule of the assessor?

It is very easy for assessors to be honest in the discharge of their duties; and, if honest, their errors of judgment can operate little to impair the uniform rule of the constitution. If they should be suffered to substitute a rule of their own for the rule of the statute, and yet to uphold their assessment by an oath that they have followed the statutory rule, it appears to me not extravagant to say that taxation in this state would rest less upon a uniform rule of assessment than upon a uniform rule of fraud and perjury.

I am quite sure that no argument of inconvenience will ever induce this court to lend its sanction to such deliberate fraud, perpetrated in the name and by the authority of the state, in a proceeding which purports to be a just and uniform, a sovereign power. It seems to me that would be a wanton abuse of judicial authority.

JUDGMENT AFFIRMED.

CRIMINAL LAW—DEGREES OF MURDER.

STATE v. WIENERS.

Supreme Court of Missouri, October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

1. MURDER—CASE IN JUDGMENT.—In a quarrel in a saloon between W. and L., the former drew a pistol and threatened to kill L., but was restrained by a bystander. Afterwards the altercation was continued, when W. struck L. a slight blow on the cheek. L. reached below the counter, seized a soda water bottle, and was in the act of throwing it at W., when W., who had drawn two pistols, holding one in each hand, shot L. with the pistol he held in his left hand, being prevented from using that in his right hand by a bystander. *Held*, that W. was properly convicted of murder in the first degree, and that it was not error for the court to refuse an instruction in regard to murder in the second degree.

2. MURDER AND MANSLAUGHTER at common law defined and distinguished.

3. MURDER IN THE SECOND DEGREE is the unlawful killing of a human being with malice aforethought, but without deliberation.

HENRY, J., delivered the opinion of the court:

The defendant was indicted for the murder of Americus V. Lawrence, and convicted of murder in the first degree. On appeal to the court of appeals the judgment on that verdict was affirmed, and he has appealed to this court.

The principal ground of complaint is, that the court failed to instruct the jury in regard to murder in the second degree. It is difficult to determine, under our statute and decisions, what is murder in the second degree; and the difficulty is attributable in part to the misapplication of the terms "malice" and "premeditation," and partly to those sections of our statute defining manslaughter in the four degrees. "Malice" and "premeditation" have been properly defined by this court, but have been misapplied in the discussions of this question, by a failure to observe the particular features of the cases in which this court has applied those terms, as defined. "Malice is the intentional doing of a wrongful act, without just cause or excuse." This definition is open to verbal criticism, for *the intentional* doing *of a wrongful* act is necessarily without just cause or excuse, for otherwise it would not be a wrongful act. So that those words are superfluous. It is also open to criticism as applicable to homicides. Take the case of an intentional killing at common law, which the provocation, although not justifying or excusing, reduced to manslaughter. "It was a wrongful act intentionally done without just cause or excuse," and by this definition it was malicious, and having been intentionally committed, contained all the elements of murder at common law; yet we know that there were at common law inexcusable and unjustifiable homicides intentionally committed which were but manslaughter. Lord Hale's definition of malice in fact "is a deliberate intention of doing any bodily harm to another whereunto by law he is not authorized." 1 Hale's Pleas of the Crown, 450. Malice is a condition of the mind, the existence of which is inferred from acts committed or words spoken. It is that condition of the mind which "shows a heart regardless of social duty, and fatally bent on mischief." To constitute a killing murder, there must be malice aforethought—not that the malice should be thought of beforehand, which would be absurd, as it is but a condition of the mind—but that the act, prompted by this malice, should be thought of before, and it signifies properly a homicide, intentionally committed with malice. If one with malice assault another to chastise, and unfortunately kill him, unless there was an intention to kill, express or implied by law from the instrument used, or the nature of the chastisement inflicted, there could be no malice aforethought as to the killing, which was not in the contemplation of the party.

To constitute murder, the killing must be with malice aforethought, that is, "an unlawful intention to take life must precede the killing." It is impossible to construe properly the first and second

sections of our act in relation to murder, without a knowledge of the common law in regard to murder and manslaughter. Murder was thus defined by Sir Edward Coke, 3 Inst., 47: "Where a person of sound memory and discretion unlawfully killeth any reasonable creature, in being and under the king's peace, with malice aforethought." Manslaughter was the unlawful killing of another without malice express or implied. "Manslaughter, which is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient." East's Pleas of the Crown, 218.

Sec. 1 Wag., page 445, defines murder of the first degree as follows: "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony." By section 2: "All other kinds of murder at common law, not herein declared to be manslaughter, or justifiable or excusable homicide, shall be deemed murder in the second degree." The word malice is not used in either section, but is included in the term murder; and malice must exist before any homicide can be declared murder in either degree.

Can there be malice aforethought where there is no intention to kill? There are cases at common law with which, apparently, the doctrine that an intent to kill is of the essence of murder is in conflict, but the conflict is only apparent. If one, in perpetrating or attempting to perpetrate a felony, kill a human being, such killing is murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide.

The law conclusively presumes the intent to kill. "If a person breaking an unruly horse wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensues from the viciousness of the animal, it is murder. For how can it be supposed that a person wilfully doing an act so manifestly attended with danger, especially if he showed any consciousness of such danger himself, should intend any other than the probable consequences of such an act? But, yet, if it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, it is only manslaughter." East, 231. The cases of the unnatural son who exposed his sick father to the air against his will, by reason whereof he died—of the harlot who laid her child under the leaves in an orchard where a kite struck and killed it—of the man who had a beast that was used to do mischief, if he purposely turned it loose, though barely to frighten people and make sport, and it killed a person—of the workman who threw down a stone or piece of timber into the street in a populous town, where people were continually passing, and killed a person, were murders, for the law presumed the intent to kill, or rather held that the parties intended the probable consequences of their act. These cases are considered in East's Pleas of the Crown, under the head of homicide, from a general malice or depraved inclination to mischief, fall where it may, in which cases the intent to kill is presumed. "The act itself must be unlawful, attended with probable serious danger, and must be done with a mischevious intent to hurt people, in order to make the killing amount to murder in these cases, for it is from these circumstances that the malice is to be inferred." "But if an unlawful and dangerous act, manifestly so appearing, be done deliberately, the mischevious intent will be presumed, unless the contrary be shown." Vol. I, 231; see, also, 235, 236.

In every case of murder at common law there was an intent to kill, either express or implied, and where all the circumstances, when the intent was not conclusively presumed, showed that no such intent existed, the homicide, if not justifiable or excusable, was but manslaughter. A and B, acquaintances, between whom no trouble has occurred and no ill-feelings exist, stand talking on the street. A tells B that he lies; B, with a heavy stick, the use whereof will not probably result in death, with no intention to kill, strikes A upon the head and kills him. Blackstone and East say that the crime of which B is guilty is manslaughter and not murder. "Words of reproach, how grievous soever, are not provocatives sufficient to free the party killing from the guilt of murder, nor are contemptuous or insulting actions or gestures without an assault upon the person, nor is any trespass against land or goods. This rule governs every case where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon not likely to kill, and had, unluckily, and against his intention, killed him, it had been but manslaughter, for no malignant intention can be collected from such acts." East's Pleas of the Crown, 233. To the same effect, Blackstone's Com. 201.

As the above supposed case was but manslaughter at common law, it, of course, could not be murder in either degree, under our statute. On page 256, East's Pleas of the Crown, a case is stated seemingly in conflict with all the cases cited, and with the doctrine maintained by him, thus: "He who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intends not death, yet is guilty of murder or manslaughter, according to circumstances, if death ensues. As if A, intending to beat B, happened to kill him, if done from preconceived malice, or in cool blood upon revenge, it will be no alleviation that he did not intend all the mischief that followed." But he immediately qualified it so that it harmonizes with the other cases put by him and with his own doctrine, thus: "But the nature of the instrument and the man-

ner of using it as calculated to produce great bodily harm or not, will vary the offense in all such cases."

"If the beating, however wrongful, was neither with a deadly weapon nor carried to a degree evidently dangerous, and there was no intent to kill, but, unfortunately, death followed, the offense would amount only to manslaughter." 2 Bishop's Criminal Law, sec. 716. "Is the act both wrongful and in its nature dangerous to life?" "This, in a large class of cases, is the test. Thus, where the defendant is wilfully committing a mere criminal misdemeanor; yet, if the misdemeanor is one endangering human life, the accidental causing of death is murder." 2 Bishop, sec. 717. In section 718, the same learned author says: "The doctrine of these cases does not wholly exclude consideration of the intent. If the act were not calculated directly to be dangerous to life, yet if it were done with the motive of committing a misdemeanor, the offense must be manslaughter." But it is unnecessary to extend this discussion. As there can be no murder without malice, express or implied, so there there can be no murder without an intention to kill, express or implied. This proposition we think is fully sustained by the authorities cited. See, also, The People v. Austin, 1 Parker's Crim. Reports, 162.

What, then, is murder in the second degree? It is the unlawful killing of a human being, with malice aforethought, but without deliberation. It is, where the intent to kill is, in a heat of passion, executed the instant it is conceived or before there has been time for the passion to subside. We do not use the phrase "heat of passion" in its technical sense, but as a condition of mind contra-distinguished from a cool state of the blood. Take the case of A and B, who had been on friendly terms, but they have an altercation in which A calls B a liar, and with a pistol or other deadly weapon, B instantly, in a passion, engendered by the insult, kills him. This, at common law, was murder, but, lacking the element of deliberation, it is, under our statute, murder in the second degree. At common law there were instances of provocations not amounting to an assault upon the person which extenuated the guilt of homicide, "or, to speak more properly, they serve to explain the act and rebut the presumption of malice." 1 East. 235, where instances are given. See, also, United States v. Wilberger, Washington Circuit Court Rep. 521.

Premeditation means thought of beforehand, even for a moment, and as an intent to kill must be preceded by an operation of the mind which produced that intent, it is argued plausibly that every intentional killing which is not excusable or justifiable must be murder in the first degree, because the malice exists if the act is without excuse. But this argument overlooks the consideration, that not only premeditation, but malice aforethought and deliberation are necessary elements of murder in the first degree.

Murder in the second degree is such a homicide as would have been murder in the first degree if committed deliberately, but having been committed in a passion, in obedience to a sudden impulse, engendered by a real or supposed grievance, and not for gain or pre-existing revenge, the law, out of consideration for the weakness of human nature, esteems it as a crime of lower grade than such willful, deliberate homicides, as in common parlance are denominated cold-blooded murders.

"Premeditation and deliberation" are not synonyms, and a homicide may be premeditated without being deliberately committed. "Malice aforethought," says Bishop in his Criminal Law, is a technical phrase employed in indictments, and with the word *murder* distinguishes the killing called murder from what is called manslaughter. When our statute declares that "every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, etc., shall be murder in the first degree," it certainly meant that the "other kind of willful, deliberate and premeditated killing" should be of the nature of that perpetrated by lying in wait, or by poison, of the same willful, deliberate and premeditated character. The common law made no distinction betwixt the guilt of the poisoner, or the assassin who shot his victim from ambush, or the robber who killed for gain, and the man who, under the influence of a momentary passion, engendered by a real or supposed grievance, on the instant that the insult or provocation was given, slew the supposed aggressor. The common sense of mankind makes a distinction and regards the poisoner and assassin with abhorrence and loathing, but while condemning the act of the man who slays in passion, without sufficient cause, regards him as far less criminal than the man who murders for gain or poisons, or assassinates for revenge. To this common sentiment of mankind our legislature has yielded and distinguished between such murders.

As was said by the Supreme Court of Kansas, in Craft v. The State of Kansas, 3, Kansas R., speaking of the provisions of the statutes of that states similar to ours: "To constitute murder at common law there must be malice prepense aforethought, *i. e.*, an unlawful intention to take life must precede the killing. But 'deliberation and premeditation' were not necessary ingredients. The same penalty was provided for killing with malice aforethought that was inflicted for malicious, deliberate and premeditated killing. The law recognized no degrees of atrocity in the crime. The law-makers of this state, as did those of other states, thought they ought to recognize some difference in the degrees of malignity with which the killing was done, and upon that basis they undertook to divide murder at common law into two degrees, so that the punishment might, to some extent, be proportioned to the moral depravity manifested in the commission of crime."

Of murder of the second degree are also all those cases of murder at common law, in which there was no specific intention to kill, but the law presumed the intent to kill which are not declared manslaughter in one of the four degrees, by our statute, and not committed in perpetrating or attempting to perpetrate a felony, as provided by the

the first section of the statute. Applying these principles to the case under consideration, should the court have instructed as to murder in the second degree? If the killing was deliberately done, it was murder in the first degree. In every homicide, however great the provocation may be, if there be sufficient time for passion to subside, and reason to interpose, it will be murder in the first degree. "The law assigns no limits within which the cooling time may be said to take place—every case must depend on its own circumstances." A purpose to kill may be conceived and deliberately executed, although but a very brief time elapse between the conception and the execution of the purpose. Deliberation does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed by the party not under the influence of a violent passion, suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose. It is no easy matter to draw the line of distinction betwixt premeditation and deliberation. It is more easily conceived than expressed. Instances are more satisfactory than definitions.

The facts, as disclosed by the testimony here, are, that prior to the 29th day of January, 1877, the defendant and the deceased were on friendly terms; that about 11 o'clock on the night of that day they quarrelled in a saloon, in which deceased was a bar-tender, but what was the occasion of that quarrel does not appear. Between 12 and 1 o'clock the principal bar-tender of the saloon adjoining the Theatre Comique, in St. Louis, sent the deceased, who was his assistant, up-stairs to call Wieners down; Wieners was a private watchman, employed at that theatre. The evidence does not show what occurred between Wieners and Lawrence up-stairs, but Lawrence returned to the saloon, followed by Wieners, who appeared to be angry. They quarrelled; each applied to the other opprobrious epithets. Wieners drew a pistol, and, cursing the deceased, threatened to kill him, but he was seized by a bystander and induced to put back his pistol, and agreed to go home. The altercation continued and Wieners struck Lawrence a blow on the cheek—one witness says with his open hand—another that it was with his fist, but whether with his open hand or fist, it did not fell or stagger Lawrence, and was evidently a very slight blow. Lawrence reached down under the counter and brought up in his hand a soda-water bottle, and was in the act of throwing it at Wieners when the latter, who had drawn two pistols, holding one in each hand, shot Lawrence with the pistol he held in his left hand, being prevented from using the right by Litsch, who had hold of him. Soon after the parties commenced to quarrel, Lawrence told the defendant, in explanation of his going to call him down, that he did it in obedience to orders given by the head bar-tender. The provocation given by deceased was slight, and his explanation, which was, in effect, an apology, should have been accepted by defendant as satisfactory. The fixed purpose of the defendant to kill Lawrence is apparent, and a circumstance, which of itself is conclusive that the killing was not done under the influence of uncontrollable passion, is the character of the blow given by him on the cheek of Lawrence. Why was such a blow given? One in a towering passion, such as will mitigate a homicide, does not measure the force of his blows. Wieners was a powerful, and Lawrence a very diminutive man. With his fist he could have felled him; and the manner in which that blow was given, in the light of what afterwards occurred, evidenced a purpose, on the part of the defendant, to provoke Lawrence to some act of aggression and then take his life, as announced by previous threats. When he struck Lawrence, the latter had a right to defend himself. And the exercise of that right could afford defendant no excuse for killing him. So determined was he to take the life of Lawrence that, while his right hand in which he had a pistol was held by Litsch so that he could not use it, with his left hand he fired the fatal shot over the shoulder of Litsch, who stood between him and Lawrence.

We have carefully examined the record to find evidence tending to mitigate the offense of which the defendant was guilty, but have failed to discover a circumstance to indicate that it was other than a deliberate murder. That he intended to kill; that there was no excuse or justification for the killing; that the provocation was slight, and that the deceased explained and apologized for it, were clearly proved, and we should have to disregard all the authorities to hold that it was a proper case for an instruction in regard to murder of the second, or manslaughter in any degree.

There was nothing in the alleged misconduct of the prosecuting attorney in interviewing the defendant's witness, or in the remarks to the jury in his argument that the murder was committed, to justify a reversal of the judgment. On these points the observations of the court of appeals in its opinion are apposite, and we adopt them as very clearly expressing our views. So of the exhibition to the jury of the bones of the vertebral column of the deceased. It served to show to the jury the attitudes and relative positions of the parties when the shot was fired. It was not an unnecessary parade of the bones of the dead man to excite prejudice against his slayer, but was legitimate and proper evidence, and a party can not, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from their consideration.

We are all agreed that the judgment should be, and it is, accordingly, affirmed.

TENDER.

In the case of Story v. Krewson, 55 Ind. 401, the court held that a "tender of the amount due upon a promissory note (payable in bank), secured by a mortgage on real estate, made upon the condition that said mortgage shall be released or cancelled, is insufficient." The court say that the authorities are in conflict whether a good tender

can be made upon the condition that a non-negotiable note shall be surrendered; but, in the case of commercial paper, the authorities are uniform that a tender upon condition that the paper shall be surrendered is good, "because such paper might be put in circulation *after payment*, and innocent parties become liable." The reasoning and the distinction are not sound. If the tender in satisfaction of commercial paper is made before maturity, the holder is not bound to accept it. If made at maturity, and the holder refuses to surrender the paper, this will not enable him to put it into circulation to the prejudice of innocent parties, because an endorsee of overdue paper takes it as dishonored, and subject to any defenses that could be successfully urged against non-negotiable paper. The court then say, a mortgage is a mere incident to a note; the payment of the note satisfies the mortgage; a party bound to pay money can not make the tender conditional upon the giving of a written receipt; and "a demand to cancel a mortgage as a condition of tender, is not different in principle from demanding a receipt as a condition to the payment."

The cases are not parallel. Where a party offers to pay money upon an indebtedness not evidenced by a writing, there is some reason why the tender should not be conditional upon the giving of a receipt; but where the creditor holds a written evidence of the indebtedness he should not be permitted to demand payment except upon the condition that the evidence of indebtedness is surrendered; and the creditors could not go into court and demand payment without bringing into court such evidence of indebtedness and leaving it upon the files of the court for the protection of the debtor.

In the case before the court, the note and mortgage had been transferred to a third party. At that time there was no law in Indiana—as there is now—authorizing the recording of the assignment of a mortgage, and, therefore, the tender was not a good one, for the reason that the assignor of the mortgage could not release or cancel the mortgage upon the record, he not being a party to it in any way, as would appear from the record. His release of the mortgage would apparently be the act of a stranger. But it is submitted, that if the tender had been made upon condition that the note and mortgage should be surrendered, the tender would have been good; and if followed up by bringing the money into court, would have carried costs and stopped the interest from the date of the tender.

The statute, up to the time this case was decided, simply required the mortgagee, or his lawful agent, to enter satisfaction of the mortgage when satisfied. The statute now authorizes the assignment of a mortgage to be recorded, and, of course, the assignee can enter satisfaction; and it would be strange if the holder of the mortgage can now demand payment and refuse to enter or acknowledge satisfaction of the same, and drive the mortgagor to an action in the courts to compel an entry of satisfaction.

In Easton v. Mitchell, 26 Mich. 500, the court held that a tender regularly and lawfully made discharges a lien, but not the debt. G. D.

CORRESPONDENCE.

PUNITORY DAMAGES.

To the Editor of the Central Law Journal:

In noticing in one of the late numbers of the CENTRAL LAW JOURNAL the decision of the Supreme Court of Wisconsin in Bass v. Chicago & N. W. R. Co., you give a few sentences from the opinion of the Chief Justice, regarding his individuals view on the rule of punitive or exemplary damages. "I always regretted," Judge Ryan says, "that this court adopted the rule of punitory damages. It is difficult, in principle, to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished." I most fully concur in the regret of the learned Chief Justice.

The doctrine of allowing punitive damages rests, at least at the present time, on an unsound foundation. Eminent legal writers have long ago pronounced against it, and have contended that the rule is against the self-evident and undisputable truth which has become a legal maxim, that a plaintiff ought to recover no more damages than he has actually sustained. If the injury he suffered was accompanied by peculiar indignities, his compensation may, of course, be greater, but still he gets something for what he *actually* suffered. By looking back into legal history we may find, perhaps, an explanation for the adoption of the rule in question. Amongst our Teutonic ancestors the line between public and private wrongs was not distinctly marked; in fact, excepting, perhaps, high treason and kindred crimes, there was no line at all. Crimes against the person, even homicide, were settled by the parties by way of composition, every hurt almost having its fixed tariff price. When that failed, the parties, or their relations, resorted to retaliation. The courts were nearly powerless to punish crime, while their jurisdiction in civil cases was generally respected. The state in those ancient times was weak, and the mode of trying crime, when courts undertook to do so, was exceedingly unsatisfactory. Hence, it is, as we presume, that courts, in civil cases, allow injured parties to recover damages not only for the actual injury, but enough more to punish the offender severely in his pocket.

In the present state of our society, however, such kind of punishment is an anomaly. Every trespass is now, or may readily be made, an offense against the public, for which the guilty is made responsible to the community. The injured party ought not to be made the avenger of a public wrong. Originally, there was an excuse, perhaps a justification, for the doctrine of punitive damages. What was barely reasonable, however, a thousand years ago, has in the course of time become absurd. In the gross injustice its application causes in many cases, by allowing a man ten or twenty, or sometimes fifty-fold the amount of damages he has actually sustained, it has been an instrument of mischief, encouraging a multitude of lawsuits of a speculative character. It has, in part, demoralized an honorable profession, by the prices held out to the litigious and unscrupulous, and their advocates in court, expecting to share in the promised confiscation of another man's property. Let the breaker of the public peace and the offender of the laws make his fine to the state, the duty of which it is to protect, and which pays for the administration of justice, but not to the injured person,

who, when compensated liberally for his individual loss, has no further claim on his opponent.

While the private judgment of the Chief Justice of Wisconsin is adverse to the giving of exemplary damages, he nevertheless, in the case before him, concurs in the rule, and assigns as a reason that its having been established by his court some twenty years ago, it is now too late to overturn it. He thinks the legislature should abolish the rule by an enactment.

Now, no reason is perceived why the courts can not unmake a law which they, beyond question, once did make. The reason which I have assigned as probable for this judicial legislation has long ceased to exist; and the rule, like many others which have first been doubted, then shaken and finally overthrown by the courts, ought to be banished out of sight. Were it not that a not inconsiderable number of the legal practitioners may look upon the retention of this national doctrine as yielding them an ample harvest of lucrative fees, I would urge upon the different Bar Associations of the country to agitate the question of undoing the precedents, or, after the advice of Judge Ryan, make an effort with the different state legislatures to confine damages in action for torts to compensation for the injury actually suffered. The very case of Bass v. Chicago & N. W. R. R. Co., where a gentleman was rudely and forcibly removed from a car usually reserved for ladies, by a brakeman, and where the company was by a jury made to pay $4,500, shows the iniquity of the principle. G. K.

NOTES OF RECENT DECISIONS.

MUNICIPAL COPORATIONS — LIABILITY OF, FOR FLOODING CAUSED BY STREET IMPROVEMENTS.—*Inman v. Tripp.* Supreme Court of Rhode Island, 17 Alb. L. J. 12. Opinion by DURFEE, C. J. Where a city, by the manner in which it grades a street, collects water from a wide area and empties it charged with the street filth upon plaintiff's adjoining land, and into his cellar and well, it is liable for the damage done plaintiff thereby.

INVALIDITY OF PASSIVE TRUSTS.—*Verdin v. Slocum.* New York Court of Appeals, 17 Alb. L. J. 13. A will, devising lands to executors in trust, contained this: "I direct my said trustees to permit and suffer my son, W. B. S., to have, receive and take the rents, issues and profits thereof, for the term of his natural life, and after his decease I give," etc. *Held*, that the son took a life estate in the lands upon which the lien of a judgment would attach, and a judgment creditor of the son was a necessary party to the foreclosure of a prior mortgage upon the lands.

FRAUDULENT REPRESENTATIONS — LIABILITY OF BANK FOR ACTS OF CASHIER—GUARANTY.—*Horrigan v. First Nat. Bk.* Supreme Court of Tennessee. 10 Ch. L. N. 112. Opinion by FREEMAN, J.—Horrigan applied to Thatcher, the cashier of a bank, for information concerning the solvency of Toof, Phillips & Co.; Thatcher replied favorably as to their credit, and, upon this assurance, plaintiff, from time to time, purchased large amounts of the bills and acceptances of said firm. Eight months later, Toof, Phillips & Co. failed, and plaintiff lost $2,000 by his investments; thereupon he brought suit against Thatcher and the bank for deceit. *Held*, an honest statement of a mere opinion, however erroneous as to the solvency or reliability of another, can not furnish the grounds for an action of this character. A party can not be held, in such a case, to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to discover for himself. 1 Metcf. p., 6: 13 Vesey, 133; Wynne & Co. v. Allen, MSS. 2. Answering questions as to the solvency of parties, is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an incident of such position, but not incident to it. *Held*, no liability attaches to the bank in such case. Barwick v. English Joint Stock Company, 2 Law Reports, 265; Swift v. Jewsbury, Law Reports, 1874, 314. 3. When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by his recommendation, is discharged by the release of the holder.

RECOVERY OF MONEY PAID ON INCOMPLETE ILLEGAL CONTRACT.—*Knowlton v. Congress and Empire Spring Company.* United States Circuit Court, Northern District of New York. 17 Alb. L. J. 10. Opinion by WALLACE, J. 1. When payments are made upon an illegal contract, and the parties are *in pari delicto*, a recovery can be had as for money had and received, where the illegality is in the contract itself and that contract is not executed. In such case there is a *locus pœnitentiæ*, the *delictum* is incomplete and the contract may be rescinded by either party. A corporation in which plaintiff was a stockholder and trustee illegally instituted proceedings to increase its stock, plaintiff participating in such proceedings and subscribing for stock. By the agreement of subscription it was provided that payments on the new stock should be made to the corporation as called for by the directors, and that, in case of failure to pay within sixty days, the party failing should forfeit all previous payments. Plaintiff paid the first call but failed to pay the second, and a forfeiture was declared against him, but before any scrip was issued for any of the increased stock the project to increase the stock was abandoned. *Held*, in an action thereafter brought to recover the money paid on the first call, that the *locus pœnitentiæ* was still open to plaintiff and he might recover. "This case comes here by removal from the state court after a decision adverse to the plaintiff by the Commission of Appeals, reversing the judgment of the Supreme Court in favor of plaintiff, and ordering a new trial. 57 N. Y. 518. * * * In deciding the present case, the Commission of Appeals (Dwight, Commissioner, dissenting) have held that money paid by one party in part performance of an illegal transaction, can not be recovered back where both parties are *in pari delicto*, and that no distinction exists as to the right of recovery between cases of partial and of entire performance. Notwithstanding the great respect which I entertain for the authority of the Commission of Appeals, I am constrained to differ from the conclusion thus reached, and must hold, in the language adopted by Mr. Justice Bradley (Thomas v. City of Richmond, 12 Wall. 355): 'A recovery can be had as for money had and received, where the illegality consists in the contract itself and that contract is not executed; in such case there is a *locus pœnitentiæ*, the *delictum* is incomplete and the contract may be rescinded by either party.' This statement of the law finds support in the early case of Walker v. Chapman, Lofft. 342, where the plaintiff had paid money to procure a place in the customs, but which he did not get, and brought suit to recover back the payment, and Lord Mansfield decided in his favor; and upon the authority of this case, in the subsequent case of Lowrey v. Bourdieu, Doug. 468, which was an action to recover a premium paid upon an insurance which was merely a gaming contract, but was brought after the event had happened upon which the insurance was to be paid, Buller, J., said: 'There is a sound distinction between contracts executed and executory,' and the plaintiff was defeated because the agreement was not executory. In Tappenden v. Randall, 2 Bos. & P. 466, an action was maintained to recover a pay-

ment upon an illegal contract, Heath, J., after adverting to the distinction between executed and executory contracts, stated by Justice Buller, saying: 'I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled to adhere to his contract.' In Hazelton v. Jackson, 8 B. & C. 221, Littledale, J., says: 'If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterward,' and a recovery was allowed on this ground. Other cases which proceeded upon this same rule are, Aubert v. Walsh, 4 Taunt. 276; Bush v. Place, id. 291; Bone v. Eckless, 1 Hurlst. & Norm. (Exch.) 925. The same doctrine has been recognized by our own courts. White v. Franklin Bank, 22 Pick. 184; Nellis v. Clark, 4 Hill, 424; Morgan v. Groff, 4 Barb. 526. And in the latest English case, Taylor v. Bowers, 34 L. T. Rep. (N. S.) 938, decided in the Court of Appeal in 1876, the plaintiff was permitted to recover property transferred to defraud creditors, where the scheme was not fully carried out, Mellish. L. J., saying: 'If money is paid for goods delivered for an illegal purpose, and that purpose is afterward abandoned and repudiated, I think the person paying the money or delivering the goods may recover; but if he waits until the illegal transaction is carried out, or seeks to enforce it, he cannot maintain his action.' In opposition to these authorities there is not a single case, of which I am aware, sustaining the conclusion of the Commission of Appeals. The cases cited in support of that conclusion, in the opinion of Lott, Chief Commissioner, are: Perkins v. Savage, 15 Wend. 412; Bell, *ex parte*, 1 M. & S. 751; Howson v. Hancock, 8 Term, 575; Bush v. Place, 6 Cow. 431, and Saratoga County Bank v. King, 44 N. Y. 92. In none of these cases did the question arise whether the plaintiff could succeed in an action in disaffirmance of an unexecuted illegal contract. In conclusion, I concur in the dissenting opinion of Dwight, Comm'r, 'that the rule is well stated in 2 Comyn on Cont. 109; if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back his deposit.' A different rule would hold out an inducement to parties to an illegal transaction to persevere in their efforts to violate the law."

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

REMOVAL OF CAUSES—REQUISITES OF PETITION.—A petition for the removal of a cause from a state to a Federal court, under the act of 1789, must expressly state that the parties were citizens of the respective states *at the time the suit was commenced*. *Phœnix Ins. Co. v. Pechner*. In error to the Court of Appeals of the State of New York. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

REMOVAL OF CAUSES—REQUISITES OF PETITION.—1. A state court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed which, upon its face, shows the right of the petitioner to transfer it. 2. Under the act of 1867, the petition for removal must state the personal citizenship of the parties and not their official citizenship. "These cases are substantially disposed of by the decision in Phœnix Ins. Co. v. Pechner, just announced. They each present the question of the sufficiency of a petition for a removal under the act of 1867. 14 Stat. 558. The suits were in New York by the defendants in error, as executors, against the plaintiff in error, a citizen of New Jersey. The petition for removal set forth sufficiently the citizenship of the plaintiff in error, but as to defendants in error, the allegations are "that said plaintiffs, as such executors, are citizens of the State of New York." Clearly this is not sufficient. Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties and not their official citizenship, if there can be such a thing. From the language here employed the court may properly infer that as persons the plaintiffs in error were not citizens of New York. For all that appears they may have been citizens of New Jersey, as was the defendant. Holding, as we do, that a state court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed which upon its face shows the right of the petitioner to the transfer, it was not error for the court to retain these causes. We need not, therefore, consider whether the act of 1867 limits the right of removal to the citizenship of the parties at the time of the commencement of the suit, or whether the state court had the right to call upon the defendants in error to show cause against the application." *Amory v. Amory*. In error to the Superior Court of the State of New York. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

FIRE INSURANCE—PRACTICE—AMENDMENT—LOSS OCCASIONED BY "INVASION, INSURRECTION," &c.—1. The findings of fact by the United States courts belong as fully to the record as the verdicts of a jury, and no bill of exceptions is necessary to bring them upon the record. 2. The court had power at a subsequent term, by an order, to correct the record by incorporating into it, *nunc pro tunc*, a special finding of the facts upon which the judgment had been rendered, where it was but an amendment of form, and there was enough to amend by. 3. A policy provided that "the company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power," etc. The property was destroyed by a fire, which was started as the only available means of carrying out an order of the military commander of Glasgow, Mo., to destroy the military stores in the City Hall, in consequence of an attack by the rebel forces upon the city. The flames spread and were communicated through two or three intervening buildings. *Held*, that the proximate cause of the loss was an invasion, or military or usurped power, and the company was not liable. "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling ageney, are not the proximate causes, and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule. Mr. Phillips, in his work on Insurance (sec. 1097), in speaking of a nisi prius case of a vessel burnt by the master and crew to prevent its falling into the hands of the enemy (Gordon v. Rimmington, 1 Camp. 123), says, the "maxim, *causa proxima non remota spectatur*, affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearest in place or time to the consummation of the catastrophe." And again, in section 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In Brady v. Northwestern Ins. Co., 11 Mich. 425, Martin, C. J., in delivering the opinion of the court, said: "That which

is the actual cause of the loss, whether operating directly or by putting intervening agencies (the operation of which could not be reasonably avoided) in motion, by which the loss is produced, is the cause to which such loss should be attributed." In St. John v. American Mutual Ins. Co., 1 Kernan, 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court, regarding the explosion, and not the fire, as the predominating cause of the loss, held the insurers not liable. Decisions are numerous to the same effect. Policies of insurance do not protect an assured against his voluntary destruction of the thing insured. Yet in Gordon v. Rimmington, *supra*, it was held that, when the captain of a ship insured against fire burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public enemy was regarded as the dominating cause. Vide, also, Emerigon, tom. 1, p. 434. And we find the same principle followed in common practice. Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames. Yet it is not doubted that destruction is caused by the fire, and insurers against fire are held liable for it. In Lyndv. Tynsboro, 11 Cush. 563, where it appeared that a traveler had been injured by leaping from his carriage, exercising ordinary care and prudence, in consequence of a near approach to a defect in a highway, the town was held liable, though the carriage did not come to the defect. The defect was regarded as the actual, the dominating, cause. And in this court similar doctrine has been asserted. Insurance Company v. Tweed, 7 Wall. 44, the principle of which case, we think, should rule the present. There it was, in effect, ruled that the efficient cause, the one that sets others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster. In Butler v. Wildman, 3 B. & Ald, 398, may be found a case where the captain of a Spanish ship, in order to prevent a quantity of Spanish dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea. The suit was upon a policy insuring the dollars, and judgment was given for the plaintiff. Bayley, J., said: "It was the duty of the master to prevent anything which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard, and the sacrifice of the money was, therefore, *ex justa causa*. It seems to me, therefore, this is a loss by jettison. But it is not a loss by jettison, it is a loss by enemies. It clearly falls within the principle stated by Emerigon, in the case of the destruction of a ship by fire, and I think the enemy was the proximate cause of the loss." Holroyd, J., said: "It seemed to him it was a loss by enemies, for the meditated attack was the direct cause of the loss." A similar doctrine was asserted in Barton v. Home Ins. Co., 42 Mo. 156, and in Marcy v. Merchants Mutual Ins. Co., 19 La. An. 388; see, also, Milwaukee R. R. v. Kellogg, 94 U. S. 475. *Ætna Ins. Co. v. Boon.* In error to the United States Circuit Court for the District of Connecticut. Opinion by Mr. Justice STRONG. Judgment reversed.

AN English judge a short time ago stated from the bench that there is ten times more perjury committed by women in his court than by men, and he added that women do not seem to care in the least what they swear to.

ABSTRACT OF DECISIONS OF THE COURT OF APPEALS OF KENTUCKY.

September Term, 1877.

[To appear in 13th Bush.]

HON. WM. LINDSAY, Chief Justice.
" W. S. PRYOR, }
" M. H. COFER, } Associate Justices.
" J. M. ELLIOTT, }

PARTITION—VENDEE OF ONE-FOURTH INTEREST IN LAND—LIEN.—1. A vendee of one-fourth interest in a tract of land may partition with the owners of the other three-fourths, notwithstanding his vendor retained a lien for the purchase-money on the fourth interest conveyed to him. 2. The vendor of an undivided fourth interest in a tract of land, after his vendee has made partition with the owners of the other three-fourths, can not assert his lien for the purchase-money on an undivided fourth of the whole, but must assert it on the one-fourth allotted to his vendee. Opinion by PRYOR, J. Affirmed.—*Hall v. Morris, Southwick & Co.*

1. WHEN A STATUTE HAS CREATED A NEW RIGHT, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy. 2. A turnpike road company must collect its tolls at its gates, and in the manner prescribed by its charter—by stopping any person riding, driving, etc., from passing through its gates until they shall have paid tue toll—and *can not recover such toll by suit, unless an agreement is alleged* and proven, upon which a common-law action may be maintained. The law will not imply a promise to pay tolls from the mere use of a turnpike road. Opinion by PRYOR, J. Reversed.—*Russell, etc., v. Muldraughs Hill, Campbellsville and Columbia Turnpike Road Co.*

EVIDENCE—ENTRIES IN BANK BOOKS.—1. A correct judgment must be affirmed, although erroneously made to rest upon a different ground by the lower court. 2. Entries in the books of a bank, made by disinterested third persons, must be proved by the persons making them, unless they have died or absconded; and then the entries themselves must be proved, when the books can not be produced to the court. It is not sufficient to prove, as was done in this case, the mere conclusions of witnesses as to their substance and effect. 3. The contents of the books of third persons, and especially of bank books, which have been regularly kept, are, when properly proved, admitted as evidence as matter of necessity, and may be used in case of the death or absconding of the person by whom they were kept. Bunker v. Shea, 8 Met. (Mass.) 150; Bowker v. Hast, 18 Pick. 555. But the entry itself, or an exact copy thereof, must be presented to the court, and, with the exceptions just named, the witness must identify it as having been made by himself, and, though he need not recollect the specific transaction, he must be able to state that he would not have made the entry if the transaction had not taken place. 18 Pick. 561. Opinion by LINDSAY, C. J. Affirmed.—*Poor v. Robinson.*

BIGAMY—REQUISITES OF INDICTMENT—EVIDENCE.—1. Indictment for bigamy should aver specificially the time and place of the first marriage, and set out the name of the first husband or wife. 2 Bishop's Crim. Pro., p. 881; 2 Archibald on Crim. Pl. and Prac., p. 1024; Criminal Code, 1877, secs. 122, 124. Commonwealth v. Whaley, 6 Bush. 266. overruled. 2. When the words of a statute are descriptive of the offense, the indictment will be sufficient if it follows the language of the statute and expressly charges the commission of the described offense. But this rule applies only to offenses which are complete in themselves when the acts set out in the statute have been done or performed, which is not the case as to the

crime of bigamy. 3. An incomplete record of divorce proceedings in Utah is inadmissible in this state to prove that the defendant had been divorced by a court of competent jurisdiction, or that the defendant believed she had been lawfully divorced by the Utah court. 4. In bigamy the felonous intent is not an element in the crime which may be rebutted by evidence. A person may be guilty of the crime of bigamy who, in good faith, believed he or she had been lawfully divorced. Opinion by LINDSAY, C. J. Judgment reversed.—*Davis v. Com.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

FORMER RECOVERY—PLEADING.—When a matter is finally determined by a competent tribunal, it is considered at rest forever. And this principle embraces not only what was actually determined, but every other matter which the parties might have litigated in the cause. Opinion by HOWK, J.—*Richardson v. Jones.*

STATUTE OF LIMITATIONS.—Where a party gave to another an altered note in payment of a debt, and the latter brought an action for damages within six years after he had notice of the alteration of the note: *Held*, the action was not barred by the statute of limitations; that the cause of action did not arise until the plaintiff discovered the fraud that had been practiced upon him. Opinion by PERKINS, J.—*Bisher v. Paulus.*

MORTGAGE—FORECLOSURE—EQUITY OF REDEMPTION.—The holder of three notes, secured by a mortgage on real estate, payable at different times, after having foreclosed the mortgage on the note last due, can not again foreclose it for the two notes first due, as against the purchaser of the equity of redemption who purchased after the first foreclosure subject to the mortgage debt, he having no notice that the notes first due had not been paid. The mortgagee must include all his notes in one foreclosure suit, and if he fails to do so a subsequent action to foreclose is barred. Opinion by WORDEN, J.—*Minor v. Hill.*

RIGHTS OF RIPARIAN OWNERS ON LAKES.—The title of riparian owners to the thread of non-navigable rivers in this state, is settled. 54 Ind. 471. This rule applies to non-navigable lakes, as well as rivers, when they lie within the congressional surveys. Any title in the owner of the land which can be maintained to the margin of the lake, will extend to the thread or middle of the lake, within the congressional surveys. A title to land acquired by twenty-five years' adverse possession, as against persons not under disability, is as effectual as if it was derived by patents from the United States, or by any other muniment of title. Opinion by BIDDLE, C. J.—*Ridgeway et al. v. Ludlow.*

TRESPASS BY COW—LIABILITY OF OWNER.—Appellee was fined by the mayor of the city of Goshen for the injury by his cow of a shade tree belonging to a private citizen. *Held*, that a man can not be held criminally for a trespass voluntarily committed by his cow, under the ordinance of the city, which provided that "it shall be unlawful for any person wantonly to injure, or cause to be injured, any private or public property, or shade or ornamental trees, etc., planted in any street or public ground of said city." The cow, not being a moral agent, was incapable of acting on the motive necessary to constitute the offense under the ordinance. But if this was a civil suit, the ordinance (or any other law) would not authorize the city to maintain a civil action for an injury to the private property of a citizen. Opinion by BIDDLE, C. J.—*City of Goshen v. Crary.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877—*Filed December* 18, 1877.

HON. JOHN WELCH, Chief Justice.
" WM. WHITE,
" WM. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
} Associate Justices.

EFFECT OF COMMUTATION OF SENTENCE.—1. Under the fifty-eighth section of the act of April 7, 1856 (S. & C. 850), commutation of the punishment of a lunatic convict by the Governor was valid and took effect without the acceptance or assent of the convict, and could not be defeated or invalidated by the convict's rejection or refusal of it when restored to reason. 2. The words "for the time being," in that section of the statute, refer merely to cases of reprieve or suspension of execution, and not to cases of commutation. 3. Commutation is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit. Judgment reversed, and the convict remanded to the warden of the penitentiary. Opinion by WELCH, C. J.—*In re Victor.*

INDICTMENT—VARIANCE—PERJURY—DRUNKENNESS.—1. Where a party to a judicial proceeding is described in the indictment as *Curtis* Pratt, which was his true name, it is not error to admit in evidence a transcript in which the same person is described as *Curt* Pratt, the variance, under section 91 of the criminal code not being material. 2. Where a charge of perjury is based upon testimony given in reference to a past transaction, evidence that the accused was "greatly intoxicated" at the time such transaction occurred, is a circumstance proper to be submitted to the consideration of the jury in determining whether the accused *knowingly* testified falsely. Judgment reversed and cause remanded to the court of common pleas for a new trial. Opinion by GILMORE, J.—*Lytle v. State.*

DECREE GRANTING INJUNCTION—APPEAL—BILL IN EQUITY.—1. An appeal may be taken to the district court, under section 5 of the act of April 12, 1858, as amended May 15, 1868 (S. & S. 589), from a decree of the court of common pleas granting a perpetual injunction restraining the defendant from obstructing and from continuing obstructions already placed upon an alleged road in which the plaintiff claimed a special use, although the plaintiff also claimed, in his petition, damages occasioned by such obstructions. 2. Such an action is in the nature of a bill in equity for injunction and, incidentially, for an account, in which neither party is entitled to demand a trial by jury. Judgment reversed and cause remanded. Opinion by MCILVAINE, J. *Converse v. Hawkins.*

LARCENY—EVIDENCE—IMPEACHMENT OF WITNESS—1. An erroneous instruction to the jury is not a ground for the reversal of the judgment, where it clearly appears from the record that the party objecting thereto was not prejudiced thereby. 2. The wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny. 3. Whether or not testimony adduced tends to establish a fact, is a question of law. 4. A witness called to impeach another, by showing statements inconsistent with those testified to, may himself, the proper foundation being laid therefor, be contradicted, by showing statements made by him out of court, incon-

sistent with those testified by him in contradiction of such other witness. Judgment affirmed. Opinion by BOYNTON, J.—*Berry v. State.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

PRIVILEGED COMMUNICATIONS — DISCHARGE OF JURY IN CRIMINAL CASE — RECORD EVIDENCE OF MARRIAGE.—On the trial of a defendant charged with the crime of bigamy, the defendant testifying in his own behalf, was required by the court to answer, on cross-examination the following question: "If he had not been consulted or advised by his counsel in regard to obtaining a copy of a decree of divorce alleged to have been granted prior to the second marriage?" against the objection of the defendant, that the communications between himself and his attorneys were privileged. *Held*, the court erred, as the defendant had not referred to any consultation or advice in connection with his attorneys in his direct examination, and that the communications were privileged. *Held, also*, that all communications which an attorney is precluded by statute from disclosing, his client can not be compelled to disclose against his objection of privilege. 2. On a criminal trial for bigamy, the court being satisfied that the jury could not agree, discharged them in the absence of the prisoner and his counsel, after they had been together for deliberation from 4 o'clock p. m. to 6 o'clock a. m., and had the record show that the discharge of the jury was granted, after it had been made to appear to the court that the jury could not agree upon a verdict, and thereafter overruled the motion and plea of the prisoner, interposed for his release and discharge, on account of the action of the court. *Held*, that the motion and plea were properly overruled. 3. The books of record of marriage licenses, kept by the probate judges of the several counties, are evidence of all matters required by the statute to be contained therein. Sections 6, 7 and 11, chapter 61, General Statutes, 562. Opinion by HORTON, C. J. Reversed. All the justices concurring. —*State v. White.*

KILLING OF STOCK BY RAILROAD CO.—EVIDENCE —TENDER.—1. In an action under the act relating to the killing and wounding of stock by railroad companies (Laws of 1874, p. 143), the plaintiff alleged in the petition, among other things, that the defendant railroad company *killed* a heifer belonging to him; but the evidence showed, among other things, that the railroad company *wounded* the plaintiff's heifer only, and that the plaintiff himself afterwards knocked her in the head and killed her. The evidence and the verdict of the jury showed, also, that the heifer would have died from her said wounds if she had not been knocked in the head, and that the plaintiff knocked her in the head merely to stop her sufferings. *Held*, that the variance between the allegations of the plaintiff's petition and the proof was not fatal, and that the court below did not err in allowing the plaintiff to recover under such allegations and proof. 2. In such action, the court instructed the jury that, if they found for the plaintiff, they might find for the *full value* of the heifer. There was no evidence tending to show that the heifer was worth anything after she was killed, and the jury find, though awkwardly, that she was worth nothing after she was killed. The jury found a verdict in favor of the plaintiff, and assessed his damages for the injuries done to the heifer at $18.00. This, from the evidence, was her full value. The court rendered judgment in favor of the plaintiff for this amount. *Held*, that the court did not err in giving said instruction or in rendering said judgment. And further *held*, that the plaintiff, the court and the jury were, under the circumstances of this case, entitled to consider the case as though the railroad company had itself actually killed said heifer. 3. Prior to the commencement of the trial, the defendant offered to confess judgment for $20.00 and costs; but the plaintiff refused to accept the offer. Afterwards the plaintiff recovered a judgment for $18 00 as damages for injuries done to the heifer, and $25.00 for attorney's fees—total, $43.00, besides costs. What the attorney's services, rendered prior to said offer to confess judgment, were worth, is not shown. *Held*, that under the foregoing circumstances, the court below did not err in rendering judgment against the defendant for all the plaintiff's costs. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*A., T. & Santa Fe. R. R. Co. v. Ireland.*

BILLS OF EXCEPTIONS — RE-OPENING CASE FOR NEWLY-DICOVERED TESTIMONY.—1. A bill of exceptions can be settled and allowed only by the judge, and when it receives his signature it should be complete, and nothing left to be settled by the agreement, recollection or judgment of counsel, clerk or other person. 2. It is a record, and, like any other record, is not to be established by parol testimony, but must carry on its face the evidences of its own integrity and completeness. 3. While what is familiarly known as a skeleton bill, that is, a bill which provides for the subsequent copying by the clerk into it, and as a part of it some paper or document, is allowed; yet to make such a bill valid and complete, these rules must be regarded: (*a.*) The bill, in referring to such paper or document, must purport to incorporate it into and make it a part of the bill; a mere reference to it, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient. (*b.*) The document must itself, at the time of the signature of the bill, be in existence, written out and complete. (*c.*) It must be annexed to the bill, and referred to as annexed, or it must be so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill; and these means of identification must be obvious to all, so that any one examining the record can know what document is to be inserted, or, after insertion, that the clerk has made no mistake. 4. Where, after all the testimony has been heard, but before the arguments have commenced, one of the parties ascertains, or has good reason to believe, that one of his adversary's witnesses has been compelled by such adversary to testify falsely against him, he is not obliged to wait until after the verdict, and then seek a remedy for the wrong by a motion for a new trial, but may immediately call the attention of the court to the matter and have it investigated, and, if true, the fact made known to the jury before retiring to consider of their verdict. 5. When the attention of the court is called to such a matter, it may investigate it openly in the presence of the jury, or in the first instance privately, and out of the hearing of the jury. The latter is the preferable course, unless the fact of such charge has in some way reached the ear of the jury, in which case it may be better that the jury should know the entire truth, rather than render a decision with a suspicion in their minds of something wrong. Affirmed. Opinion by BREWER, J.; Valentine, J., concurring; Horton, C. J., not sitting in the case.—*A. & N. R. R. Co. v. Wagner.*

AN English solicitor named Dinsdale is charged with having manufactured and disposed of fictitious leases to the amount of over a million and a half dollars. As there is no registry act in force in London, the swindle was not easily discovered.

BOOK NOTICE.

THE LAW AND PRACTICE IN BANKRUPTCY. A complete treatise of the law of Bankruptcy, being Title LXI of the United States Revised Statutes and Amendments, with the Decisions thereunder. By ALEXANDER BLUMENSTIEL. New York: Ward & Peloubet. 1878.

This, the latest work on the Law of Bankruptcy, extends to 757 pages, and contains the statutory provisions of the bankrupt law; a complete collection of all the American cases on the subject, and a full reference to all the important adjudications made in the English courts upon similar provisions in the English Acts; an exhaustive statement of the practice under the bankrupt law, with all the forms, rules in Equity and general orders established by the Supreme Court of the United States. The table of cases, at the beginning of the volume, contains the names of no less than 1,600 adjudications. These, in the body of the book, are arranged under their appropriate titles, and, by the aid of a good index which the work possesses, both the subjects and the authorities are easily found. We do not hesitate to say that we believe Mr. Blumenstiel's book will be of much service to the practitioner in this department; though, whether he has succeeded in showing, as announced in the preface as the author's reason for undertaking the work, that the "supposed complications" in the working of the bankrupt law are "but imaginary," may remain a question of some doubt. The arrangement of the cases, and the different sections of the Act, and, in fine, the general plan of the work, suggest that, to call it either an Annotated Edition of the Bankrupt Act, or a Digest of the Bankrupt Law, would be a somewhat more appropriate title than the more dignified and high-sounding one of Treatise. It is dedicated to Judge Blatchford, of the United States District Court for the Southern District of New York.

Exp. for *ex parte*, which occurs several times on nearly every page, seems to be a rather peculiar contraction, especially as we do not notice that in any instance, *Inr.* has been made to stand for *In re.*

NOTES.

AT a jury court held in Greenlaw, on the 18th of December, says the Scottish *Journal of Jurisprudence*, the newspapers report a curious scene. The learned sheriff of the county having been somewhat late in taking his seat on the bench, a juryman rose and said: "My lord, if I had been a minute late I would have been fined;" another juryman made a similar observation, and the public in the court-room applauded. The sheriff then ordered the court to be cleared, and the ballot for the jury was proceeded with.

Is the practice of laudatory dedications coming into vogue again in the legal world? We observe that a recent legal treatise is dedicated to the Lord Chancellor "as a tribute of admiration for his unsullied integrity as a judge, profound knowledge as a lawyer, and exalted character as a statesman and legislator." This is intended as a highly complimentary series of phrases; but we rather doubt whether Lord Cairns will appreciate the admiration extorted by the remarkable fact that, "as a judge," he does not take bribes; and the references to "profound knowledge as a lawyer," without any averment of power to apply such knowledge, and of "exalted character," without any notice of ability, are very unfortunate.—[Solicitor's Journal.

AMONG the points of law decided in Vol. II, Reports of Surrogates Courts, New York, recently published, are that a tombstone is a proper item of funeral expenses, though the estate be insolvent; that a man sixty years old, who was accustomed to call regularly for an annuity due him, having left his home afflicted with three incurable diseases, which his physician thought must kill him in three months, may be presumed to be dead in six months, not having been heard of in the meantime; that a marriage between slaves in Virginia, according to their customs, is valid in New York; that concealment by a man of the fact that a divorce obtained by him from his wife is invalid, whereby he induces another woman to marry him, is undue influence which will avoid her will made in his favor.—[American Law Review.

THE *International Review* for January-February, 1878, is a splendid number of this excellent magazine. It contains an article on Elements of National Wealth, by David A. Wells, and on Money and its Laws, by Prof. W. G. Sumner. Three papers by foreigners—The Second Harvest of Olympia, First Impressions of Athens and Imperial Federalism in Germany, are from the pens of Prof. Earnst Curtrus, Dr. Edward A. Freeman and Baron Von Holtzendorff, respectively. Sumner's Place in History, by Ben. Perley Poore, Modern Love, by Dr. Samuel Osgood, The Count of the Electoral Vote, by Alexander H. Stephens, a Sonnet on Thiers, by Whittier, and a sketch of Art in Europe, are the remaining articles. These, with a number of excellent reviews of recent books, American, English, French, German and Italian, offer an intellectual feast, such as can not be surpassed by the best and oldest of the English or American reviews. It is published by A. S. Barnes & Co., New York.

THE Washington correspondent of the Cincinnati *Enquirer* gives, in a recent issue, a racy sketch of the leading members of the bar of the Supreme Court of the United States. Sidney Bartlett, of Boston is, it is said, its leader, an old celebrated lawyer, who wins the Union Pacific railroad cases by such clear, lucid statements that they amount to mathematical demonstration. Mr. Evarts had a large practice before this court, but has personally resigned it while in office, though his firm yet argues many cases. Southmayd, Evarts' partner, is said to be a better lawyer than Evarts himself. Matt. Carpenter is said to have the most lucrative practice before the various courts—estimated at $50,000 to $60,000 a year. He is the most brilliant pleader before the Supreme Court, advancing, as old Senator Nye used to say, "almost to the line of genius." The judges on the Bench regard Senator Edmonds, of Vermont, as a very able lawyer. One of them said but yesterday, "He is one of our best lawyers—one of the most successful." He generally wins his causes, and, it may be said, stands next to Bartlett at present. Roscoe Conkling often argues railroad cases before the court, particularly Central Pacific cases, and makes a good impression. He is a man of care and pains, and the son of a United States judge. Senator Dawes at rare intervals appears before the august tribunal, and also ex-Senator Boutwell. The latter has an office—Commissioner to revise the Statutes—at $5,000 a year. The bill is said to have been passed by Boutwell for the benefit of Kenneth Raynor, but on his defeat for the Senate the thrifty New Englander had himself appointed. Philip Phillips, of Alabama, is a Supreme Court practitioner, and has the reputation of being very well read and well posted. Ben Butler has very considerable practice of all kinds here. It is said that Col. Craig, who was acquitted by the action of the judge on the charge of pressing a fraudulent claim during the present week, had to mortgage his great ranch in Colorado to insure Butler's fee. The late James T. Carlyle left a fortune as the result of his practice, and his two sons are in the district bar. The only judge on the bench, whose brother practices before it, is Field. David Dudley Field is a big man every way, though some say his heart would stand an enlargement.